

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Public Governance, Performance and Accountability Act 2013

Public Governance, Performance and Accountability Act (Consequential and Transitional Provisions) Act 2014

Public Governance, Performance and Accountability Legislation Amendment (Officials and Other Measures) Rule 2015

The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) sets out a framework for regulating resource management by the Commonwealth and relevant entities. Section 101 of the PGPA Act provides that the Finance Minister may make rules by legislative instrument to prescribe matters giving effect to the Act.

The *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* deals with consequential and transitional matters in connection with the PGPA Act. Item 6 of Schedule 14 of the CTP Act provides that the Finance Minister may, by legislative instrument, make rules prescribing matters required or permitted by the CTP Act and the PGPA Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The *Public Governance, Performance and Accountability Legislation Amendment (Officials and Other Measures) Rule 2015* (Officials and Other Measures Rule) would amend the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) and the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Rule 2014* (CTP Rule). The Officials and Other Measures Rule makes amendments relating to:

- the prescription of officials;
- the treatment of the Australian Defence Force Cadets for the purposes of the finance law;
- the membership of the advisory committee on authorisations and payments by the Finance Minister;
- transitional financial reporting arrangements; and
- audit committee membership.

Prescription of officials

There are provisions in the PGPA Act that permit a person, or a person in a class to be prescribed by an Act, or the rules under the PGPA Act, as an official of a Commonwealth entity. Paragraphs 13(3)(c) and 13(4)(d) (for non-listed Commonwealth entities), and subsection 13(5) of the PGPA Act (for listed Commonwealth entities) provide a mechanism for prescribing that particular individuals, or classes of individuals, are officials.

Section 9 of the PGPA Rule is made under paragraphs 13(3)(c) and 13(4)(d) of the PGPA Act, prescribing certain persons to be officials of a non-listed Commonwealth entity.

The Officials and Other Measures Rule amends section 9 of the PGPA Rule to provide a mechanism for the accountable authority of a non-corporate Commonwealth entity (NCCE) to engage a person, who is not part of a Commonwealth entity, to exercise powers, functions or duties under the PGPA Act or PGPA Rule on behalf of the NCCE. Under this mechanism, the accountable authority must implement arrangements that identify such a person by name, and thereby prescribe the person as an official of the NCCE. The accountable authority would only need to prescribe the person as an official of the NCCE if it is intended that the individual exercise a power, function or duty under the PGPA Act or PGPA Rule.

Treatment of Cadets for the purposes of the finance law

The Officials and Other Measures Rule gives effect to the policy intention of the Department of Defence (Defence) that officers, instructors and cadets of the Australian Defence Force Cadets should not be classified as officials of Defence. The Officials and Other Measures Rule repeals item 3(b) in subsection 9(1) of the PGPA Rule which prescribes officers, instructors and cadets of the Australian Defence Force Cadets as officials. The Officials and Other Measures Rule also inserts a new item 2 in subsection 9(2) of the PGPA Rule to exclude explicitly officers, instructors and cadets of the Australian Defence Force Cadets from being classified as officials of Defence.

Advisory Committee on authorisations and payments by the Finance Minister

Section 24 of the PGPA Rule sets out requirements around authorisations by the Finance Minister concerning certain payments.

Subsection 24(2) of the PGPA Rule requires the Finance Minister to consider a report of the advisory committee, established under subsection 24(3), before making certain authorisations, for example waivers, set-offs and act of grace payments that involve amounts above \$500 000.

Under subsection 24(3) of the PGPA Rule, the advisory committee must consist of particular members. The Officials and Other Measures Rule amends subparagraph 24(3)(a) of the PGPA Rule to replace the Chief Executive Officer of the Australian Customs and Border Protection Service as a member of the advisory committee, with the Secretary of the Department responsible for administering the *Infrastructure Australia Act 2008*.

Financial Reporting

The Officials and Other Measures Rule repeals section 10 of the CTP Rule. Section 10 is a transitional provision under the CTP Rule which related to the preparation of annual financial statements ahead of the commencement of the *Public Governance and Accountability (Financial Reporting) Rule 2015* (FRR). As the FRR commenced on 12 February 2015, and applies to reporting periods commencing on or after 1 July 2014, section 10 of the CTP Rule is no longer required.

Audit Committee

The Officials and Other Measures Rule amends section 17 of the PGPA Rule in relation to audit committees. The Officials and Other Measures Rule would insert a new

subsection 17(4A) to clarify that a person engaged primarily for the purpose of being a member of the audit committee is not to be treated as an official or employee of the entity.

Details of the Officials and Other Measures Rule are set out at [Attachment A](#). A statement of compatibility with human rights is at [Attachment B](#).

The Officials and Other Measures Rule is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and is subject to the disallowance provisions in that Act.

Consultation

The amendments relating to the prescription of officials were developed through consultation with entities that are part of the Governance, Risk Management and Culture Reference Group established under the Public Management Reform Agenda, and the Accountable Authority Instructions Working Group. The Australian Government Solicitor (AGS) provided advice on the proposed amendment.

The amendments relating to the treatment of the Australian Defence Force Cadets for the purposes of the finance law were developed in consultation with the Defence and AGS.

The amendments relating to the membership of the advisory committee under section 24 of the PGPA Rule arose as a result of the merger of the Australian Customs and Border Protection Service into the Department of Immigration and Border Protection, effective from 1 July 2015. The Parliamentary Secretary to the Minister for Finance, the Hon Michael McCormack MP, sought and received the agreement of the Minister for Infrastructure and Regional Development, the Hon Warren Truss MP, for the Secretary of the Department of Infrastructure and Regional Development to become the new member of the advisory committee.

The amendments relating to financial reporting were developed following earlier consultation undertaken in developing the FRR. This consultation included the Australian National Audit Office (ANAO) and all Commonwealth reporting entities required to apply the FRR in preparing their financial statements.

The amendments relating to audit committees were raised by a number of non-corporate Commonwealth entities. The Department of Finance investigated the breadth of the implications arising from the issue and subsequently consulted with the ANAO and the Governance, Risk Management and Culture Reference Group.

All amendments under the Officials and Other Measures Rule were drafted by the Office of Parliamentary Counsel.

Details of the Public Governance, Performance and Accountability Legislation Amendment (Officials and Other Measures) Rule 2015

Section 1—Name of rule

This section provides that the title of the rule is the *Public Governance, Performance and Accountability Legislation Amendment (Officials and Other Measures) Rule 2015*.

Section 2—Commencement

This section provides that each provision of the instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table.

Specifically:

- Sections 1 to 4 of the instrument commences on the day after the instrument is registered;
- Schedule 1, Part 1 of the instrument commences on 1 July 2015; and
- Schedule 1, Part 2 of the instrument commences on the day after the instrument is registered.

Section 3—Authority

This section states that the instrument is made under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* (CTP Act).

Section 4—Schedules

This section provides that each legislative instrument that is specified in a Schedule to this Rule is amended or repealed as set out, and that any item in a Schedule to this instrument operates or is applied as specified in the Schedule.

Schedule 1 – Amendments

Part 1 – Amendments commencing 1 July 2015

Public Governance, Performance and Accountability Rule 2014

Item 1 – Section 9

This item amends section 9 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) to omit the text “officials of a Commonwealth entity (other than a listed entity)” and substitute the text “official of a Commonwealth entity”. This would clarify that section 9 prescribes certain persons, or classes of persons, to be, or not to be, officials of a Commonwealth entity.

Item 2 – Section 9

This item inserts “, and subsection 13(5)” after “(4)(d)” in section 9 of the PGPA Rule, and would clarify that section 9 is made under paragraphs 13(3)(c), 13(4)(d) and subsection 13(5) of the PGPA Act.

The intention of this item is to enable a person to be prescribed as an official of a listed Commonwealth entity or a non-listed Commonwealth entity.

Item 3 – Subsection 9(1) (after table item 1)

Item 3 inserts a new item 1A after table item 1 under subsection 9(1) of the PGPA Rule. This would provide a mechanism for the accountable authority of a non-corporate Commonwealth entity (NCCE) to engage a person who is not part of a Commonwealth entity to exercise powers under the PGPA Act or the PGPA Rule on behalf of the NCCE.

Paragraphs (a) and (b) in subsection 9(1) of the PGPA Rule specify which persons can be prescribed as officials by an accountable authority of a NCCE:

- Subparagraph 1A(a)(i) would permit the accountable authority of a NCCE to prescribe a natural person who is a consultant or independent contractor as an official of the entity to provide services to the NCCE. Subparagraph 1A(a)(ii) would permit the prescription of an employee of a contractor company. This subparagraph caters for situations where a consultant or independent contractor enters into an arrangement with a NCCE, under which an employee of the consultant or independent contractor provides the services to the NCCE.
- Paragraph 1A(b) would permit the accountable authority of a NCCE to prescribe a person as an official, if the accountable authority intends that the consultant or independent contractor exercise a power, function or duty under the PGPA Act or PGPA Rule.

Paragraph (c) specifies that the accountable authority of a NCCE is to prescribe a person as an official by implementing a mechanism that identifies the person by name as an official of the NCCE.

Once the accountable authority of a NCCE has prescribed a person as an official, the accountable authority must delegate the relevant powers, functions or duties under the PGPA Act or PGPA Rule to the person. This will enable the person to exercise the relevant powers, functions and duties under the PGPA Act or PGPA Rule on behalf of the entity.

Item 4 – Paragraph 24(3)(a)

This item amends paragraph 24(3)(a) of the PGPA Rule to specify that the advisory committee must include “the Secretary of the Department (Infrastructure Secretary) responsible for administering the *Infrastructure Australia Act 2008*.”

The Finance Minister is required to consider a report of the advisory committee before making an authorisation relating to a waiver, set-off and act of grace payments, where it involves an amount greater than \$500 000.

Item 5 – Subparagraph 24(3)(c)(ii)

Item 5 omits “Australian Customs and Border Protection Service” from subparagraph 24(3)(c)(ii) of the PGPA Rule and substitutes “Infrastructure Department”.

This item provides that the accountable authority of a Commonwealth entity, nominated by the Finance Minister in writing, is to act as a member of the advisory committee where there is no Commonwealth entity responsible for the matter to which the authorisation relates or if the Infrastructure Department is responsible for the matter.

Part 2 – Amendments commencing day after registration***Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Rule 2014*****Item 6 – Section 10**

This item repeals section 10 of the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Rule 2014* (CTP Rule). Section 10 is a transitional provision under the CTP Rule which related to the preparation of annual financial statements ahead of the commencement of the *Public Governance and Accountability (Financial Reporting) Rule 2015* (FRR). As the FRR commenced on 12 February 2015, and applies to reporting periods commencing on or after 1 July 2014, section 10 of the CTP Rule is no longer required.

Public Governance, Performance and Accountability Rule 2014**Item 7 – Subsection 9(1) (table item 3)**

This item repeals table item 3 in subsection 9(1) of the PGPA Rule and substitutes a new table item 3 that no longer prescribes an officer, instructor or cadet in the Australian Air Force Cadets, the Australian Army Cadets, or the Australian Navy Cadets, as an official of the Department of Defence (Defence).

Table item 3 will continue to prescribe a member of the Australian Defence Force as an official of Defence, unless the member’s services are made available to the Chief Executive Officer of the Defence Materiel Organisation.

Item 8 – Subsection 9(2) (at the end of the table)

This item inserts a new table item 2 which specifies that an officer, instructor or cadet in the Australian Air Force Cadets, the Australian Army Cadets, or the Australian Navy Cadets, is not an official of Defence.

Item 9 – After subsection 17(4)

This item inserts a new subsection 17(4A) to clarify that a person employed or engaged primarily for the purpose of being a member of the audit committee is to be treated, for the purpose of subsection 17(4), as not being an official or employee of the entity.

Item 10 – Subsection 17(5)

This item makes a technical amendment to accommodate the new subsection 17(4A).

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

The *Public Governance, Performance and Accountability Legislation Amendment (Officials and Other Measures) Rule 2015* (Officials and Other Measures Rule) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) establishes a framework for regulating resource management by the Commonwealth and relevant entities. Section 101 of the PGPA Act provides that the Finance Minister may make rules by legislative instrument to prescribe matters giving effect to the Act.

The *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* deals with consequential and transitional matters in connection with the PGPA Act. Item 6 of Schedule 14 of the CTP Act provides that the Finance Minister may, by legislative instrument, make rules prescribing matters required or permitted by the CTP Act and the PGPA Act.

The Officials and Other Measures Rule would amend the Rule instruments made under the PGPA Act and the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* (CTP Act), namely, the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) and the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Rule 2014* (CTP Rule). The Officials and Other Measures Rule would make amendments relating to:

- the prescription of officials;
- the treatment of the Australian Defence Force Cadets for the purposes of the finance law;
- the membership of the advisory committee on authorisations and payments by the Finance Minister;
- transitional financial reporting arrangements; and
- audit committee membership.

Human rights implications

The legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

The legislative instrument is compatible with human rights as it does not raise any human rights issues.

**Senator the Hon Mathias Cormann
Minister for Finance**